NOTE

THE APP STORE DILEMMA: REVENUE "CUTS," APP RESTRICTIONS, AND PAYMENT SYSTEMS, IS THERE UNFAIR COMPETITION?*

ABSTRACT

In *Epic Games, Inc. v. Apple Inc.*, the United States District Court for the Northern District of California held that Apple did not operate a monopoly in its App Store marketplace, offered through its famously known mobile device, the "iPhone." Both parties appealed aspects of the district court's decision to the Ninth Circuit Court of Appeals, which affirmed the decision in full, except for the award of attorney fees. While this App Store dilemma continues to unfold, several companies, U.S. states, and even the U.S. Congress have sided in favor of Epic, trying to provide support in its fight for a fairer App Store. This Note examines where the district court erred, and where it correctly applied the law. It also analyzes Epic's future chances, as there is a lot of work to be done before victory can be claimed.

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I. INTRODUCTION

With the evolution of technology, there has also been a change in the ways a monopoly can be established. Today, there are different methods and means that can allow a company to compete unfairly, creating unjust advantages over competitors, and violating the Sherman Antitrust Act.[1] In the recently decided case *Epic Games, Inc. v. Apple, Inc.*, the district court determined that Apple did not operate a monopoly through its App Store.[2] The Ninth Circuit affirmed the district court's analysis and conclusions, remanding only on the issue of attorney fees.[3] For background, Apple takes a 30% commission of the revenue made by any company or individual that completes a sale on the App Store.[4] Although on some occasions the fee may be reduced to 15%,[5] there are major companies and several U.S. states that have voiced their complaints about this system[6] because it can dramatically reduce the profits of companies that rely heavily on their App Store or in-app sales.[7]

To put it into perspective, if a company makes $1 billion through the App Store, Apple will get $300 million for what some will say is "doing nothing," but essentially, Apple is charging that fee for licensing its intellectual property.[8] However, while it is true that Apple is the owner and creator of the software that allows its consumers to buy third-party content in the first place, the question becomes, is that fee harsh enough to be considered unfair? Does Apple have an unfair advantage over competitors by leveraging its power through imposing app and payment

1. The Sherman Act was initially passed as a "'comprehensive charter of economic liberty aimed at preserving free and unfettered competition' . . . [that] outlaws 'every contract, combination, or conspiracy in restraint of trade,' and any 'monopolization, attempted monopolization, or conspiracy or combination to monopolize.'" *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/NYF7-LCP8] (last visited Mar. 19, 2023) (quoting the Sherman Act, 15 U.S.C. §§ 1–38 (1890)).

2. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 922 (N.D. Cal. 2021).

3. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 966 (9th Cir. 2023).

4. *Epic Games*, 559 F. Supp. 3d at 923.

5. *Id.* at 947 (noting an exception to the 30% commission only if the developer makes less than $1 million a year, i.e., developers only get this benefit if they are not big enough to compete with Apple).

6. Jay Peters, *Epic Largely Lost to Apple, but 35 States Are Now Backing Its Fight in a Higher Court*, VERGE (Jan. 28, 2022, 7:19 PM), https://www.theverge.com/2022/1/28/22907106/epic-games-v-apple-amicus-briefs-states-eff-microsoft-appeal [https://perma.cc/7A47-Q7HR].

7. *Epic Games*, 559 F. Supp. 3d at 998–99.

8. *Id.* at 922–23.

restrictions via licensing agreements? High revenue cuts and third-party app restrictions work to suffocate companies trying to compete with services provided by Apple, including video games, music streaming, cloud storage, and even messaging apps. This Note will review the district court's analysis and explore areas where Epic Games could have strengthened its case to increase its chances of prevailing on its claims. A victory for Epic would have benefited consumers overall.

II. ORIGINS OF AN "EPIC" REVOLT

Video game developer Epic Games, sued manufacturer of smartphones and smartphone operating system (OS) Apple Inc., bringing antitrust claims under sections 1 and 2 of the Sherman Act and under California's Unfair Competition Law (UCL).[9] Epic Games challenged Apple's license agreement with app developers, which requires them to distribute apps to consumers exclusively via Apple's App Store, and transactions within apps to occur exclusively through the App Store's in-app purchasing system.[10] Apple counterclaimed, alleging that Epic Games breached their agreement by pushing out a software "hotfix" that enabled users to make in-app purchases directly from the developer's website rather than through the manufacturer's system for in-app purchases, and thus without paying the 30% commission Apple was entitled.[11]

From its conception, Apple has maintained a 30% commission rate from all sales made by third-party app developers.[12] This fee is charged for any revenue made through the App Store, including in-app purchases. This is at the center of the case, as Epic Games and several other companies claim, that this fee is too high and thus "choking competition."[13] The district court believed the 30% revenue cut to be "unjustified" because there is no real value offered as it is impossible to determine if 30% reflects the fair market value of the services absent

9. *Id.* at 921–22, 1027, 1051.

10. *Id.* at 942–44, 1002, 1010.

11. *Id.* at 936–37, 1059. A hotfix is a quick, single data package which includes information to address a specific problem in a software product through an update. Chrissy Kidd, *Patch vs Hotfix vs Coldfix vs Bugfix: Differences Explained*, BMC (Nov. 24, 2020), https://www.bmc.com/blogs/patch-hotfix-coldfix-bugfix/ [https://perma.cc/9FQC-EWKF].

12. *Epic Games*, 559 F. Supp. 3d at 947.

13. Emily Rella, *Spotify CEO Slams Apple, Says Company Is 'Doing Serious Harm' and 'Choking Competition,'* ENTREPRENEUR (Nov. 2, 2022), https://www.entrepreneur.com/business-news/spotify-ceo-daniel-ek-slams-apple-for-doing-serious-harm/438380 [https://perma.cc/2TLH-NGM8].

competition.[14] Therefore, without any real alternative structure, the court could not decide on this percentage's reasonableness.

Epic Games' Chief Executive Officer (CEO), Tim Sweeney, acknowledged that several months before this claim started, there was a plan codenamed "Project Liberty."[15] This plan was an orchestrated strategy to avoid paying the fees imposed by both Apple and Google, which were described by Epic as "an attempt to provide developer choices for payment solutions and bring that benefit to the customers" on platforms where alternative choices are not available.[16] One of the main characteristics of Project Liberty is that Epic included a "hotfix."[17] Developers can use hotfixes to trigger content or features in an app that are in the code but not originally accessible to users.[18] Even though hotfixes are common in the software development world, Project Liberty's hotfix was a violation of Apple's licensing agreement that Epic Games had signed when it started developing software for the iOS operating system.[19] This was a blatant violation of Epic Games' contractual obligations. Epic Games acknowledged it was breaking its contract with Apple when its co-founder predicted that the breach would eventually result in the removal of Fortnite and a potential lawsuit against them.[20]

Defining the correct market is crucial to any antitrust case.[21] After reviewing the evidence, the court concluded that the relevant market was "digital mobile gaming transactions."[22] Apple claimed that the relevant product market in this claim should have been a "market for all digital video games in which it and Epic Games compete heavily."[23] Apple conveniently believes that it does not have monopoly power within its defined market, and therefore, is not violating any federal or state law.[24] Epic Games proposed a theory of two aftermarkets: one being for the App Store and another for payment processing of iOS apps.[25] The district court disagreed with both parties. The court reasoned that game transactions are disproportionately affected by Apple's challenged

14. *Epic Games*, 559 F. Supp. 3d at 997–98.

15. *Id.* at 935; *Tim Sweeney Profile*, FORBES, https://www.forbes.com/profile/tim-sweeney/?sh=a7fb1a667b38 [https://perma.cc/77NK-A63X] (last visited Feb. 27, 2024).

16. *Epic Games*, 559 F. Supp. 3d at 936.

17. *Id.*

18. *Id.*

19. *See id.* at 936–37, 1059.

20. *Id.* at 938.

21. Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020).

22. *Epic Games*, 559 F. Supp. 3d at 921.

23. *Id.*

24. *Id.*

25. *Id.* at 954.

conduct, overwhelmingly subsidizes other apps, and are recognized as a distinct submarket.[26] Epic Games and Apple compete in that market space; "[t]hat Epic Games is in the market was the impetus for the analysis, not the reason for the conclusion."[27] The district court further analyzed that "there is a specialized subset of iOS gaming consumers who are generating and accounting for a significantly disproportionate number of App Store billings and revenue."[28] Lastly, the geographic market is defined as an "'area of effective competition' . . . where buyers can [choose from] alternate sources of supply."[29] The district court correctly determined the area of effective competition in the geographic market was global, excluding China.[30]

The only "victory" Epic Games had was the ruling against Apple's anti-steering clause, which banned developers from providing links to outside payment methods or even mentioning other payment methods.[31] The court found Apple to be in violation of California's UCL, issuing an injunction against Apple.[32] Apple was restrained from prohibiting app developers from including external links in its metadata that direct customers to different purchasing mechanisms.[33] Apple's anti-steering provisions were found to hide critical information from consumers and illegally stifle consumer choice.[34] This meant the provisions were defined as anticompetitive, and a nationwide remedy eliminating those provisions was warranted by the court.[35] In October 2021, Apple appealed the decision, seeking a stay on the injunction, which was due to go in effect in December 2021.[36] The court approved Apple's late request to delay making changes to the developers rules on its App Store platform.[37] In its appeal, Apple claims the anti-steering rules are

26. *Id.* at 953.

27. *Id.* at 1019.

28. *Id.*

29. Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991) (quoting Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)).

30. *Epic Games*, 559 F. Supp. 3d at 1026–27.

31. *Id.* at 922, 944.

32. *Id.* at 1058.

33. *Id.* at 1057–58.

34. *Id.*

35. *Id.*

36. Kif Leswing, *Apple Files Appeal in Epic Games Case, Potentially Delaying App Store Changes for Years*, CNBC, https://www.cnbc.com/2021/10/08/apple-files-appeal-in-epic-games-case-that-could-delay-changes-.html [https://perma.cc/FS4G-96DC] (last updated Oct. 8, 2021, 8:13 PM).

37. Russell Brandom, Epic v. Apple *Ruling Put on Hold After Appeals Court Grants a Stay*, VERGE (Dec. 8, 2021, 1:34 PM), https://www.theverge.com/2021/12/8/22814147/epic-apple-app-store-injunction-paused [https://perma.cc/5W4B-K9DZ].

unnecessary because the company planned to delete the anti-steering provisions from their App Store Guidelines.[38]

The district court did not find it impossible for Apple to be a monopoly, but it did find that Epic Games failed to meet its burden to demonstrate that Apple is an "illegal monopolist."[39] Both Apple and Epic Games appealed the district court's decision to the Ninth Circuit. Epic Games' appeal notice sought to appeal the final judgment "and all orders leading to or producing that judgment."[40]

In April of 2023, the Ninth Circuit concluded that while the district court made some legal errors, those mistakes did not impact the outcome.[41] Regardless of the "harmless" errors, Epic Games failed to prove its proposed market definition or show there were viable alternatives for Apple to achieve the procompetitive benefits of its closed iOS ecosystem.[42] The circuit court ended up affirming in part and reversing in part, only reversing regarding attorney fees, where it remanded for further proceedings.[43] Both Epic Games and Apple appealed the decision to the U.S. Supreme Court in July 2023, but at the start of 2024, the Supreme Court denied to hear the case.[44] Notably, Epic achieved victory in its very similar case against Google, which was decided by a jury. [45]

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38. Jay Peters & Sean Hollister, *Apple Is Appealing the Epic Games Ruling It Originally Called a 'Resounding Victory'*, VERGE (Oct. 8, 2021, 6:21 PM), https://www.theverge.com/2021/10/8/22717271/apple-appeals-epic-games-ruling-anti-steering [https://perma.cc/SRV6-RUUZ].

39. *Epic Games*, 559 F. Supp. 3d at 1032, 1049.

40. Tom Krisher, *Epic Games Appeals Ruling in Lawsuit Alleging Apple Monopoly*, ASSOCIATED PRESS (Sept. 12, 2021, 4:29 PM), https://apnews.com/article/lifestyle-technology-lawsuits-san-francisco-apple-inc-52febb143da2907490e42f813f5f277f [https://perma.cc/RUU6-MTPK].

41. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 973 (9th Cir. 2023).

42. *Id.*

43. *Id.* at 966, 1004.

44. Mike Scarcella, *Apple to Ask US Supreme Court to Undo App Store Order in Epic Games Case*, REUTERS (July 3, 2023, 1:19 PM), https://www.reuters.com/legal/apple-ask-us-supreme-court-undo-app-store-order-epic-games-case-2023-07-03/ [https://perma.cc/2G6K-88Q5]; Andrew Chung, *Epic Games Asks US Supreme Court Let App Store Order Take Effect*, REUTERS (July 27, 2023, 2:13 PM), https://www.reuters.com/legal/epic-games-asks-us-supreme-court-let-app-store-order-take-effect-2023-07-27/ [https://perma.cc/4SA5-WRSK]. Adi Robertson, *Supreme Court Rejects* Epic v. Apple *Antitrust Case*, VERGE (Jan. 16, 2024, 9:25 AM), https://www.theverge.com/2024/1/16/24039983/supreme-court-epic-apple-antitrust-case-rejected [https://perma.cc/WT8A-VEL4].

45. Bobby Allyn*, Epic Games Beat Google but Lost to Apple in Monopoly Lawsuits. What Does It All Mean?*, NPR (Dec. 13, 2023, 12:52 PM), https://www.npr.org/2023/12/13/1218945531/fortnite-epic-games-google-apple-app-stores [https://perma.cc/8L59-JS7F].

III. ANALYSIS

A. The App Store Dilemma

From the early days of the iPhone, Apple faced the necessity of building a platform where software developers could use Apple's tools to create applications through its licensed intellectual property.[46] After combining a series of built applications, the App Store was created.[47] Profit has always been important to Apple. Apple founder and late CEO, Steve Jobs, said the "purpose in the App Store is to add value to the iPhone," and thus to "sell more iPhones."[48] Diving deeper into this statement, no economist is needed to conclude that the purpose behind the goal of selling more iPhones is to make more money and increase overall revenue. By increasing its revenue, Apple puts itself in a better position to extend its monopoly in any of the different markets where it attempts to outsell the competition, if there is any. Apple's then-Vice President of Developer Relations, Ron Okamoto, admitted developers try to make Apple's platforms more appealing to users, incentivizing them to buy more Apple products.[49]

Taking a closer look at other tech companies that operate app stores and other video game marketplaces, it seems as if the custom among the biggest players is to have fees at 30% of the revenue made from digital sales.[50] Recently we have seen this practice change, however, as Google is now allowing companies like Spotify and the dating app Bumble, to implement their own payment systems within the app.[51] It is undisputed that Apple has a right to take some fee for licensing its intellectual property to developers.[52] However, knowing that Apple also competes with most of the app developers that it licenses to, a 30% cut may promote unfair competition by giving Apple an unfair advantage over competitors, enriching itself by the success of the competition via the revenue cut.

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46. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 941–42 (N.D. Cal. 2021).

47. *Id.* at 946.

48. *Id.*

49. *Id.*

50. Chris Button, *How Digital Distribution and Game Prices Are Costing Developers*, GAMESHUB (May 24, 2022), https://www.gameshub.com/news/features/how-game-prices-digital-distribution-and-xbox-game-pass-affects-developers-10912/ [https://perma.cc/WG4V-KXU7].

51. Kif Leswing, *Google Now Allows Spotify and Bumble to Bill U.S. Users Inside Apps*, CNBC, https://www.cnbc.com/2022/11/10/google-now-allows-spotify-and-bumble-to-bill-us-users-inside-apps.html [https://perma.cc/GGL3-QWLB] (last updated Nov. 10, 2022, 4:05 PM).

52. *Epic Games*, 559 F. Supp. 3d at 1039.

Apple can deny some apps from entering the App Store.[53] Apple will not allow apps that include pornographic content, malicious apps that could steal consumers' protected data, apps that violate Apple's privacy policy, and other apps that could be in violation of the law.[54] This app review process appears to be very efficient, as 50% of the apps submitted for review by third-party app developers are reviewed within the first twenty-four hours and a stunning 90% are reviewed within the first forty-eight hours from submission.[55] With such high percentages, it seems that it would be easy for Apple to add a process for reviewing apps that also work as distribution systems of more apps, or apps that stream online gaming content through the cloud.

Apple's app guidelines treat cloud-based game streaming as an outlier.[56] Apple seeks to eliminate cloud gaming from its store by only allowing the inclusion of game streaming apps if the streamed app itself is also available as a separate app, killing the purpose of streaming in the first place.[57] Several companies, including Microsoft, Google, and Nvidia, suffered Apple's rejection for offering game streaming services within a single app.[58] These distinctions between gaming streaming apps are important because other streaming services apps, such as Spotify or Netflix, do not face this type of scrutiny by Apple's app review guidelines.[59] Additionally, it has been recognized that consumers do not have the information required to understand that third-party app developers have virtually no control over issues that could arise regarding payments, privacy, refunds, and other requests that consumers believe could be easily resolved because developers must go through Apple first, even if Apple has nothing to do with the third-party app or its business.[60]

Furthermore, it is important to note that Project Liberty might not have been the right way to respond to Apple's policies. Epic Games' CEO, Tim Sweeney, "admitted while testifying under

53. *Id.* at 948.

54. *Id.* at 948, 1006.

55. *Id.* at 948.

56. *See id.* at 950, 982 (noting that cloud-based game streaming is a technology that allows users to watch or play content over the Internet without having the user download the content into the device).

57. Filipe Espósito, *Microsoft Tried to Negotiate with Apple to Release Xbox-Exclusive Games on App Store*, 9TO5MAC (Dec. 9, 2021, 3:10 PM), https://9to5mac.com/2021/12/09/microsoft-tried-to-negotiate-with-apple-to-release-xbox-exclusive-games-on-app-store/ [https://perma.cc/GRP2-4BPS].

58. *Epic Games*, 559 F. Supp. 3d at 950.

59. *Id.* at 993.

60. *Id.* at 951.

oath that he 'would have' accepted a deal" where Epic Games was the only beneficiary and "no other developers" benefited[61] These words by Sweeney could have been avoided. Epic Games should have been clearer in communicating its goal of seeking real justice for all developers within the mobile app industry. There is no justification to break the law to answer what is to be believed a policy harming competition. Epic's Project Liberty made the statement and generated the impact it had anticipated, but it also showed rebellious behavior. Furthermore, Apple gave Epic the right to cure its breach of contract as it repeatedly offered to allow Fortnite to return to the App Store if Epic Games agreed to comply with the signed agreements, but Epic Games consistently declined.[62] The means that Epic Games used to achieve its end goal can be questioned, as it meticulously planned to breach its contract by launching Project Liberty.

Nonetheless, the district court correctly concluded that Apple's operating margins were highly tied to the App Store's operations.[63] Experts at trial determined that the App Store operating margins were above 75% for the years of 2018 and 2019.[64] The App Store's high profit margins indicate Apple's market power. Just as the court stated: "[T]he App Store operating margins are '*extraordinarily high*.' Thus, *even without comparison to other stores*, the operating margins strongly show market power."[65] However, Apple has never proven a correlation between the value of what it licenses to developers and the commission Apple wants in return,[66] making the 30% an arbitrary amount and merely pretextual.

B. Lethal Wounds: The Court's Market Definition Was Fatal for Epic

1. Mobile Gaming Is Just the Tip of the Iceberg. The way in which the market is defined can sway the outcome of the case one way or the other. As one court explains it, "[t]he relevant market is the field in which meaningful competition is said to exist."[67] Without an appropriate definition of the relevant market, courts

61. *Id.* at 939; *Tim Sweeney Profile*, *supra* note 15.
62. *Epic Games*, 559 F. Supp. 3d at 941.
63. *Id.* at 953.
64. *Id.* at 952.
65. *Id.* at 993 (emphasis added).
66. *Id.* at 994.
67. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997).

are typically unable to accurately apply the rule of reason.[68] Here, Epic Games had the burden to establish both the relevant product and geographic market, and to prove "the effects of the restraint within those markets."[69]

One of the key decisions made by the court that detrimentally affected Epic's case was to label the product market as mobile gaming transactions.[70] Judge Gonzalez Rogers tried to provide reasons as to why the market was defined that way, but some of those reasons simply do not add up. First, the court concluded the App Store business model is "fundamentally built upon lucrative gaming transactions" and that gaming apps "further have distinct producers—game developers—that generally specialize in the production of *only* gaming apps . . . subject to unique and emerging competitive pressures, that differs . . . from the competition in the market for non-gaming apps."[71] This explanation given by the court on why it decided the overly narrow product market the way it did falls short of reality because, in the end, consumers suffer equally regardless of whether they are spending their money in a gaming app or in any other type of app.

Further, the court did not seem to understand the purpose or meaning of the App Store because it defined it as "primarily a *game* store and secondarily an 'every other' app store."[72] This definition by itself defeats the entire purpose of one of Apple's main projects, Apple Arcade, defined by Apple as a "game subscription service that offers unlimited access to a growing collection of . . . games . . . featuring new releases, award winners, and beloved favorites from the App Store."[73] Apple executives were smart to disguise the Arcade as a "subscription," something more similar to what Judge Gonzalez Rogers would call a "game store," as opposed to the App Store where the focus is not on the games, despite Judge Gonzalez Rogers's categorization.[74] In terms of market share, Apple's "mobile gaming transactions appear[] to fluctuate anywhere from approximately 52% to 57% over the course of the three years in evidence."[75] While the prior

68. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018).

69. Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989).

70. *See Epic Games*, 559 F. Supp. 3d at 1021.

71. *Id.* at 1017.

72. *Id.* at 1018.

73. *See What Is Apple Arcade?*, APPLE, https://www.apple.com/apple-arcade/ [https://perma.cc/P4VQ-3FAX] (last visited Jan. 28, 2024).

74. *See Epic Games*, 559 F. Supp. 3d at 992, 1018. Apple puts mobile games in the spotlight through Apple Arcade, not the App Store. *See What Is Apple Arcade?*, *supra* note 73.

75. *Epic Games*, 559 F. Supp. 3d at 1030.

figures do not indicate that the market share is high enough for there to be a monopoly under section 2 of the Sherman Act, the numbers show that Apple's share in mobile gaming is increasing, and that Apple has the majority of the market share in a mainly duopolistic marketplace.[76]

When explaining why the court defined the market as it did, the explanations were shallow. Judge Gonzalez Rogers claimed that Epic Games did not focus much on this topic.[77] Inexplicably, the court recognized that Apple is "near the precipice of substantial . . . monopoly power[] with its considerable market share" but ignored that Apple controls 100% of the in-app purchase transactions because there are no payment substitutes.[78] The court, however, saw that in-app purchases cannot be considered products for two reasons: integration and consumer demand.[79] This conclusion is flawed because the iPhone and Apple's "comprehensive system to collect commission[s]" is not integrated.[80] The court's conclusion is simply not true. Just as eBay allows you to pay through different systems, like PayPal,[81] Apple can open its doors to other payment collection systems and let the consumer decide who ultimately gets the commission.

Likewise, Apple has control of 100% of the market for app distribution methods that are available for the iPhone,[82] and it will soon be evident in the mobile gaming transaction market if Apple's market share growth continues at this rate. Technically, Apple was only found free of liability by the fact that its share in the mobile gaming market is not slightly higher.[83] Because competitors do not have an alternative, leaving iOS could mean their disappearance from the market, proving fatal to their balance sheets.

2. And Justice for All: These Restrictions Affect Everyone. The issue in this case is deeper than just digital mobile gaming transactions. At its core, Epic Games' suit denounces how Apple leverages its market power in the App Store against its competitors.

76. *Id.*

77. *Id.* at 1032.

78. *Id.* at 1010–11, 1032.

79. *Id.* at 1046.

80. *Id.*

81. *See Paying for Items*, EBAY, https://www.ebay.com/help/buying/paying-items/paying-items?id=4009 [https://perma.cc/7GUA-R5SL] (last visited Jan. 28, 2024).

82. *See Epic Games*, 559 F. Supp. 3d at 922, 935 (referring to Apple's App Store because it is the only mobile storefront available for the iPhone; Apple possesses a variety of competitors in this particular submarket for its other products, like the MacBook).

83. *Id.* at 1032.

This problem can be analogized to other apps. For example, Spotify is a streaming service app that competes with Apple Music.[84] Even in a different market than the one where Epic Games and Apple compete, some of Spotify's main source of revenue (subscriber payments) would go directly into its main competitor's pocket.[85] Similarly, Epic Games competes with Apple in a space where Apple is obtaining a hefty 30% cut of Epic's iOS revenue.

Spotify is just one of the thousands of companies that can work as an example to illustrate how there are other players that do not fit in the market description provided by the court and are nonetheless affected in the very same way that Epic Games is being affected. It is no coincidence that other tech companies have provided amicus briefs in favor of Epic.[86] The court's definition of the relevant market clearly benefits Apple. All the entities who have filed amicus briefs should consider being added to the claim. Rule 20 of the Federal Rules of Civil Procedure could allow this if all apps were considered, because it would be a common question of law.[87] Including a broader spectrum of app developers (i.e., companies, governments, or individuals) could pave the way for the market to be defined as *all* mobile app transactions. Companies like Microsoft could have a case against Apple, especially after Apple denied Microsoft's xCloud app[88] on its App Store for allegedly being incompliant with the App Store Review Guidelines.[89] Microsoft was able to release a version of its app,[90] but Apple required consumers to download each game through the

84. *About Spotify*, SPOTIFY, https://newsroom.spotify.com/company-info/ [https://perma.cc/HVL4-FTGZ] (last visited Jan. 29, 2024); *Apple Music*, APPLE, https://www.apple.com/apple-music/ [https://perma.cc/9D5B-YZN5] (last visited Jan. 28, 2024).

85. Jess Weatherbed, *Spotify Is Booting Legacy Subscribers Still Paying Via Apple's App Store*, VERGE (July 6, 2023, 6:54 AM), https://www.theverge.com/2023/7/6/23785523/spotify-premium-subscribers-apple-app-store-payments-support [https://perma.cc/UH2X-CJDW].

86. Lauren Feiner, *Microsoft and Meta Accuse Apple of Playing Games with App Store Rules*, VERGE (Mar. 20, 2024, 1:02 PM), https://www.theverge.com/2024/3/20/24106838/apple-epic-anti-steering-developers-in-app-payments-meta-microsoft-match [https://perma.cc/G2SG-AVYM].

87. *See* FED. R. CIV. P. 20(a)(1) (noting that Permissive Joinder of Parties occurs if the court determines there is a common question of law or fact, and if there is some right to relief relating to the same transaction or occurrence).

88. *Xbox Cloud Gaming (Beta)*, XBOX, https://www.xbox.com/en-US/cloud-gaming [https://perma.cc/54TS-DSCP] (last visited Mar. 26, 2024) (xCloud, now called Xbox Game Pass, is a streaming service for videogames and is owned by Microsoft).

89. *See* Sean Hollister, *Microsoft Quietly Told Apple It Was Willing to Turn Big Xbox-Exclusive Games into iPhone Apps*, VERGE (Dec. 9, 2021, 3:18 PM), https://www.theverge.com/2021/12/9/22826297/microsoft-xbox-xcloud-streaming-exclusives-iphone-ipad-gamepas [https://perma.cc/2KAA-F7FN].

90. *See App Store Preview: Xbox Game Pass*, APPLE, https://apps.apple.com/us/app/xbox-game-pass/id1374542474 [https://perma.cc/FH9Q-A7UA] (last visited Feb. 10, 2024).

iOS store,[91] making it a "bad experience for customers."[92] It is understandable why customers would want to jump directly into their content, and not be forced to download one hundred apps,[93] virtually killing the concept of "cloud" gaming. [94]

Several U.S. states are also joining this legal battle. It is important to highlight the supportive response of the several states (thirty-five, to be exact) that filed amicus briefs through a coalition of their respective attorneys general.[95] The brief filed by the states reads in part:

> Apple's conduct has harmed and is harming mobile app developers and millions of citizens. . . . Apple continues to monopolize app-distribution and in-app payment solutions for iPhones, stifle competition, and amass supracompetitive profits within the almost trillion-dollar-a-year smartphone industry. Apple must account for its conduct under a complete rule of reason analysis.[96]

This is evidently true because a win, or a broad ruling, can open the door for Apple to continue leveraging its dominance in iOS on the different third-party app developers that are trying to compete in the different markets.[97] Focusing solely on legal compliance without ethical considerations can result in harmful outcomes. If the Supreme Court had found Apple in violation of sections 1 and 2 of the Sherman Act, Apple could continue with its innovation and advocacy for consumer privacy, while allowing third-party app developers to offer something meaningful to consumers outside of the Apple ecosystem.[98] The fact that states have joined the party should signal that Epic is on the side of consumers, those whom ultimately the court must seek to protect.

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91. Kef Leswing, *Apple Issues New Rules for App Store that Will Impact Streaming Game Services from Google and Microsoft*, CNBC, https://www.cnbc.com/2020/09/11/apple-app-store-new-rules-will-affect-google-stadia-microsoft-xcloud.html [https://perma.cc/RWL3-A487] (last updated Sept. 11, 2020, 4:52 PM).

92. Tom Warren, *Microsoft Snubs Apple's Olive Branch to Cloud Gaming: 'A Bad Experience for Customers,'* VERGE (Sept. 11, 2020, 3:35 PM), https://www.theverge.com/2020/9/11/21433071/microsoft-apple-app-store-rules-xcloud-game-streaming-xbox-game-pass [https://perma.cc/W9HD-E6ZD].

93. *Id.*

94. *Id.* (i.e., without requiring a download).

95. Peters, *supra* note 6.

96. Brief of Utah and 34 Other States as Amici Curiae in Support of Plaintiff-Counter-Defendant-Appellant and Reversal at 24, Epic Games, Inc. v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023) (No 21-16506).

97. Peters, *supra* note 6.

98. *See id.*

C. Fear the Obvious: Violations of Section 1.

1. An Evident Agreement. Section 1 of the Sherman Act prohibits contracts and agreements that unreasonably restrain trade or commerce among U.S. states or with foreign nations.[99] The Act says, "To establish liability under section 1, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade."[100] Courts evaluate the reasonableness of a restraint under either per se analysis or the rule of reason.[101] Further, under the act, "The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition."[102] The court must consider all the circumstances of a case in determining whether a restrictive practice should be barred as imposing an unreasonable restraint on competition.[103]

A three-step framework of shifting burden applies when determining if the rule of reason is violated in restraint of trade.[104] As the Supreme Court explained:

> Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.[105]

The district court erred in its analysis that Apple's Developer Program License Agreement (DPLA) was not a contract "that fell

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99. 15 U.S.C. § 1.

100. Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016); Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 989 (9th Cir. 2020) (quoting *Aerotec*, 836 F.3d at 1178); *see also* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189–91 (2010).

101. Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373, 377–78 (1966).

102. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984)).

103. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 422 U.S. 36, 49 (1977)).

104. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1034 (N.D. Cal. 2021).

105. *Am. Express Co.*, 138 S. Ct. at 2284 (citations omitted).

within the scope of Section 1."[106] First, the court claimed that the DPLA was a nonnegotiable unilateral contract, which prohibited developers from distributing apps outside the App Store.[107] While it is harder to find illegality through unilateral conduct because the different jurisdictions have seen this as pro-competitive, unilateral restraints on trade that are labeled as unreasonable can still be subjected to antitrust scrutiny if they pose a real danger of monopolization.[108] Concluding that a contract does not violate section 1 on the basis of unilateral conduct alone is one thing, but the court crossed the line when it erroneously concluded that there was no sufficient evidence to label the DPLA as an agreement,[109] even after Apple themselves labeled the document as an agreement.[110]

The court also seemed to forget that some of the provisions written in the DPLA explicitly prohibited developers from creating different app distribution channels or payment alternatives when consumers make a purchase.[111] If the court pays close attention to the DPLA provisions, it will see that Apple has obligations that are immediately created the moment the developer "agrees" to the terms, meaning there are contractual obligations on both sides, and there, is in fact, a "contract" by definition.[112] The court's conclusion on the first elements shows it ineffectively applied the statutory text of section 1 and binding case law. A contract is capable of an antitrust violation regardless of how it was negotiated because the restraints would exist anyway.[113] This can have irreparable consequences for the free market, and more importantly, for consumers. The message being sent is that market players who possess relevant market power will escape liability under section 1, even after imposing coercive terms on their nonnegotiable agreements. A win for Apple on this issue is a loss for consumers.[114]

106. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 971, 983 (9th Cir. 2023).

107. *Epic Games*, 559 F. Supp. 3d at 993, 1034–35.

108. *Id.* at 1035; *see also* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768–69, 775 (1984).

109. *Epic Games*, 559 F. Supp. 3d at 1036.

110. *Apple Developer Program License Agreement*, APPLE, https://developer.apple.com/support/downloads/terms/apple-developer-program/Apple-Developer-Program-License-Agreement-20230828-English.pdf [https://perma.cc/J2YT-LZQQ] (last visited Feb. 8, 2024).

111. *Id.* at 18, 27.

112. *Id.* at 14.

113. *See* Antitrust Division, *The Antitrust Laws*, U.S. DEP'T OF JUST. ANTITRUST DIV., https://www.justice.gov/atr/antitrust-laws-and-you [https://perma.cc/XW6U-7NUS] (last updated Dec. 20, 2023).

114. *See, e.g.*, Dustin Bailey, *Despite the End of* Epic vs. Apple*, Fortnite Isn't Coming Back to iOS Yet*, PCGAMESN (Sept. 10, 2021), https://www.pcgamesn.com/fortnite/ios-2021 [https://perma.cc/AMN9-YSDT].

2. Totalitarian Measures and Double Standards. The court's final holding contradicts its factual findings. The court recognized that such restrictions result in anticompetitive effects, preventing competitors from providing consumers with an easier way to access multiple apps within a single distribution method.[115] The denial of such apps ultimately harmed the consumer, something the court ignored, as it claimed that Epic Games failed to prove Apple possessed monopoly power in the relevant market and that the challenged restrictions are anticompetitive under a rule of reason analysis.[116]

One of the arguments given by Apple regarding its policies for app distribution is that the restrictions would increase security for consumers, preventing malware from infecting devices.[117] However, this is pretextual; Apple has the manpower to review most apps in less than forty-eight hours.[118] A third-party app distribution system would nonetheless be downloaded by consumers in the form of an app, meaning Apple's App Review is likely to provide the same amount of scrutiny to those apps that work as distributors.[119]

Furthermore, the court ignored the double standard that has been established by Apple between its own devices, the iPhone, and the MacBook. There are inexplicable policy differences between both; one of the key differences is that MacBooks permit the installation of third-party app stores.[120] While providing oral arguments to the Ninth Circuit, Apple's counsel suggested the reason for this is because Apple desired the iPhone to be "safer" through a more robust level of review.[121] However, this argument makes it seem as if Apple does not care about the security of MacBook users.[122] A likely explanation for Apple's different review processes between its products is that Apple fears that if those same restrictions were to be imposed on the MacBook, it would

115. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1037–38, 1042 (N.D. Cal. 2021).

116. *Id.* at 1043–44.

117. *See id.* at 1003–04.

118. *Id.* at 948.

119. *See* Jonny Evans, *Is This How Apple Will Support App Sideloading in Europe?*, COMPUTERWORLD (Nov. 14, 2023), https://www.computerworld.com/article/3710548/is-this-how-apple-will-support-app-sideloading-in-europe.html [https://perma.cc/85G7-RLM9].

120. *Epic Games*, 559 F. Supp. 3d at 995.

121. *See* Oral Argument at 55:45, Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021) (No. 4:20-cv-05640), https://www.youtube.com/watch?v=WS8Oe09GaqU [https://perma.cc/P2FA-Y9PS].

122. *Id.*

place the MacBook below its competitors. However, Apple is now forced to allow third-party app stores, at least in Europe.[123]

Apple claims that the review process on its MacBooks provides protection, allowing its users to download apps safely from the App Store and the Internet.[124] This model, according to the court, protects users from dangerous third-party apps that could bring malware. To deepen the double standard, Apple replied by saying that applying the MacBook program to the iPhone would be a difficult task because the timing may not align with developer's expectations.[125] This excuse is weak, as the timing on the app review process is not guaranteed, and Apple has never given individualized estimates to its developers on the app review timeline.[126] App review is required for all apps in the App Store, and neither the amount nor timing themselves appear to be a real problem.[127] Apple's own product, the MacBook, is an example of a less restrictive alternative that does not put consumer security in jeopardy. This, unfortunately, is in complete discrepancy with the court's holding that no alternatives are "'virtually as effective' as the current distribution model and can be implemented 'without significantly increased cost.'"[128] The evidence is clear, Apple has violated section 1 of the Sherman Act.

D. Operating a Monopoly 101: Diving into Section 2.

The district court also erred in rejecting Epic Games' claims under section 2 of the Sherman Act. Section 2 focuses on the monopolization of trade in interstate commerce.[129] For a defendant to be liable, the plaintiff has the burden of showing: "(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power;

123. *See* Thomas Claburn, *Forcing Apple to Allow Third-Party App Stores Isn't Enough*, REGISTER (Oct. 9, 2023, 6:50 PM), https://www.theregister.com/2023/10/09/apple_app_store/ [https://perma.cc/VEP7-47VH]; *see also* William Gallagher, *Apple Admits Third-Party App Stores in Europe Are Inevitable*, APPLE INSIDER (Nov. 8, 2023), https://appleinsider.com/articles/23/11/08/apple-admits-third-party-app-stores-in-europe-are-inevitable [https://perma.cc/KJ8M-8XUR]. Hasan Chowdhury, *Apple Was Just Forced to Crack Open Its App Store—But the Changes Are Already Being Called 'Hot Garbage,'* BUS. INSIDER (Jan 27, 2024, 3:51 AM), https://www.businessinsider.com/apple-app-store-shakeup-in-europe-triggers-fury-2024-1 [https://perma.cc/BMW7-YL89].

124. *Epic Games*, 559 F. Supp. 3d at 1008–09.

125. *Id.* at 1009.

126. *See App Review FAQ*, APPLE DEV., https://forums.developer.apple.com/forums/thread/131256 [https://perma.cc/37EW-233S] (last visited Mar. 21, 2024).

127. *See supra* text accompanying notes 53–55, 118.

128. *Epic Games*, 559 F. Supp. 3d at 1008–09, 1041 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1260 (9th Cir. 2020)).

129. 15 U.S.C. § 2.

and (c) causal antitrust injury."[130] Additionally, if a company lacks monopoly power in a primary market, there could still be a finding of sufficient market power in a subsidiary market that violates antitrust laws.[131]

While the court disagreed, Epic Games correctly argued that Apple is in complete control of the iOS platform.[132] Even if the court, as it did, finds a lack of monopoly power in the mobile gaming market, it is clear that Apple possesses absolute control over the aftermarkets brought up by Epic.[133] There is zero competition when it comes to both the app distribution systems and the in-app payment systems.[134] Apple willfully maintained its monopoly on the App Store through its DPLA because of the imposed restrictions on third-party developers.[135]

It is undisputed that there are two main competitors in the market for smartphone operating systems: Apple through iOS, and Google through Android.[136] These two systems are clear substitutes as every developer chooses between the two ecosystems in developing apps,[137] and consumers make the final decision on which device they want to purchase.[138] It is impossible for an iPhone to run Android OS without illegally hacking the device.[139] Without providing further

130. Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 990 (9th Cir. 2020) (quoting Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)).

131. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481–82 (1992).

132. *Epic Games*, 559 F. Supp. 3d at 1049; Sara Morrison, *How Much Control Should Apple Have Over Your iPhone?*, VOX (Dec. 8, 2021, 5:30 AM), https://www.vox.com/recode/22821277/apple-iphone-antitrust-app-store-privacy [https://perma.cc/KPY9-F5UK].

133. *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 999 (9th Cir. 2023); Morrison, *supra* note 132.

134. *See supra* Section III.B.0.

135. *See Epic Games*, 67 F.4th at 982–83; Mark MacCarthy, *The Epic-Apple App Case Reveals Monopoly Power and the Need for New Regulatory Oversight*, BROOKINGS (June 2, 2021), https://www.brookings.edu/articles/the-epic-apple-app-case-reveals-monopoly-power-and-the-need-for-new-regulatory-oversight/ [https://perma.cc/6CD7-X64Q]; Stephen Schenck, *Apple's App Store Monopoly Could Finally Be Coming to an End*, ANDROID POLICE (Dec. 13, 2022), https://www.androidpolice.com/apple-third-party-app-store-ios-eu/ [https://perma.cc/4VCD-BTHP].

136. *See Epic Games*, 559 F. Supp. 3d at 959–60, 962 (Android is the operating system found in devices supported by Google).

137. *iOS vs. Android App Development: What's the Difference?*, MOOC.ORG (Nov. 29, 2021, 12:00 PM), https://www.mooc.org/blog/ios-vs.-android-app-development [https://perma.cc/G6EZ-MRPK].

138. *See 5 Stages of the Consumer Purchase Decision Process*, SHOPIFY (Nov. 18, 2023), https://www.shopify.com/blog/purchase-decision [https://perma.cc/8R6X-8Y28].

139. *Software License Agreements*, APPLE, https://www.apple.com/legal/sla/ [https://perma.cc/DXM3-LRAF] (last visited Jan. 19, 2024); *iOS Software License Agreement*, APPLE, https://www.apple.com/legal/sla/docs/iOS17_iPadOS17.pdf [https://perma.cc/B4EW-PJMD] (noting that when buying an iPhone, you are directly and strictly bound to the iOS terms);

analysis, the court concluded that smartphone operating systems are neither licensed nor sold to anyone.[140] In doing so, the district court appears to have ignored *United States v. Microsoft Corp.*[141] There, the D.C. Circuit held that Microsoft's imposition of its license agreement provisions reduced the usage of competing software, and therefore, Microsoft's operating system worked as a monopoly.[142] Furthermore, Microsoft licensed its intellectual property to PC makers, much as Google licenses its Android operating system to smartphone manufacturers.[143] The court also found that Microsoft competed with several other Internet browsers, even after Microsoft's browser was pre-installed with its operating system,[144] just as Apple pre-installs its App Store on its iOS operating system.[145]

Another way Apple ties consumers to its products is via iCloud, a form of cloud storage. Cloud storage services are one of the newest ways a company can attract customers, as the world we live in today is inclined to storing personal data, including photos, music, voice memos, notes, e-mails, and more, in online datacenters.[146] The major tech companies tend to offer cloud services to their consumers. Apple offers iCloud[147] and Google offers Google Drive.[148] Offering these personal cloud storage services to consumers is an indirect way of making those customers stay in a particular environment, that environment being iOS or Android. Years of consumer personal data is being stored on these datacenters, making it harder for people to easily transfer the data from one device to the next, as the process of

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Ravie Lakshmanan, *You Can Now Run Android on an iPhone with 'Project Sandcastle,'* HACKER NEWS (Mar. 5, 2020), https://thehackernews.com/2020/03/install-android-on-iphone.html [https://perma.cc/7ETN-5J9E].

140. *Epic Games*, 559 F. Supp. 3d at 955.

141. United States v. Microsoft Corp., 253 F.3d 34, 60 (D.C. Cir. 2001).

142. *Id.*

143. *Id.* at 59–61; *What Phones Are Compatible with Google Pay?*, PAYCEC (May 26, 2023), https://www.paycec.com/us-en/faq/what-phones-are-compatible-with-google-pay [https://perma.cc/U5L7-UKB4].

144. *Microsoft Corp.*, 253 F.3d at 62.

145. *List of Built-in iOS Apps*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_built-in_iOS_apps [https://perma.cc/8HU8-MGH3] (last visited Jan. 19, 2024).

146. *Forecast Number of Personal Cloud Storage Consumers/Users Worldwide from 2014 to 2020*, STATISTA (Oct. 28, 2016), https://www.statista.com/statistics/499558/worldwide-personal-cloud-storage-users/ [https://perma.cc/YZ2U-FJJG]; *What Is a Data Center?*, IBM, https://www.ibm.com/topics/data-centers [https://perma.cc/J5SM-K8B7] (last visited Mar. 4, 2024).

147. *See iCloud*, APPLE, https://www.icloud.com/ [https://perma.cc/GVC5-JBPB] (last visited Feb. 8, 2024).

148. *See Google Drive*, GOOGLE, https://www.google.com/drive/ [https://perma.cc/T7YZ-MVN4] (last visited Feb. 8, 2024).

retrieving the data is tedious, and the fear of losing some of the information in the transfer process looms.[149]

As different competitors try to leverage technological advancements to retain and expand their market share, the tying arrangement has long been a practice scrutinized by antitrust laws.[150] Apple offers Apple One, a bundle of up to six services that includes Apple Music, Apple TV+, Apple Arcade, iCloud+, Apple News+, and Apple Fitness+.[151] All these bundled services provide a personalized experience through data collection, aiming for the user to progressively use them all instead of any competitor present in each subsidiary market.[152] To put the impact of Apple's bundling in perspective, we can take Spotify and Epic Games as examples of smaller companies affected by this monopolistic practice. A bundle that includes both Apple Music and Apple Arcade allows Apple to compete simultaneously in different markets, against different competitors, all of whom are sending 30% of their revenue to Apple without any other option. Losing 30% is better than simply missing out on 100% of profits and letting Apple win by opting out of selling in the App Store. Furthermore, it cannot be ignored that while this competition for consumers is ongoing, Apple still benefits from the revenue earned by its competitors by taking away 30% of their revenue made on the App Store.[153]

Different products can form distinct markets even if those products must be used together.[154] These different markets are capable of coexisting for the benefit of consumers.[155] Similarly, all iPhones have iOS installed,[156] meaning that whether consumers choose Apple for its iOS or for the hardware itself would not matter because they are tied anyway. In *Newcal*, for example, the Court of Appeals for the Ninth Circuit emphasized that preventing consumers

149. Tyler Lacoma, *7 Things You'll Hate About Switching from Android to iOS*, ANDROID POLICE, https://www.androidpolice.com/things-youll-hate-about-switching-from-android-to-ios/ [https://perma.cc/CWA4-4AFU] (last updated June 5, 2023); *See* STUART E. MADNICK, THE RISING THREAT TO CONSUMER DATA IN THE CLOUD 3 (2022), https://www.apple.com/newsroom/pdfs/The-Rising-Threat-to-Consumer-Data-in-the-Cloud.pdf [https://perma.cc/QX5U-Y4D7].

150. United States v. Microsoft Corp., 253 F.3d 34, 84, 89 (D.C. Cir. 2001).

151. *The Best of Apple. All in One.*, APPLE, https://www.apple.com/apple-one/ [https://perma.cc/72SS-WFP5] (last visited Feb. 4, 2024).

152. *See id.*

153. *See supra* text accompanying note 12.

154. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 462–63 (1992).

155. Olin Corp. v. Fed. Trade Comm'n, 986 F.2d 1295, 1301 (9th Cir. 1993).

156. Will Kenton, *Apple iOS: What It Is for iPhone and iPad, vs. Mac OS*, INVESTOPEDIA, https://www.investopedia.com/terms/a/apple-ios.asp [https://perma.cc/RH37-WG6E] (last updated Feb. 11, 2024).

from realizing their choice in the initial market will impact their freedom to shop in the aftermarket because aftermarkets are derivate of foremarkets.[157] Here, Apple's restrictions focus on the aftermarket because it secures its market power through the relation it establishes with consumers. This means that the district court erred in determining that foremarket competition does not restrain anticompetitive practices in the aftermarkets.[158]

E. Reality Check: Most Consumers Are Stuck with Their Devices

The district court failed in its approach of the consumers' cost of switching devices. The factual findings show that the costs of switching are relatively high.[159] iPhone users who desire to switch to Android abandon not only the hardware, but all their apps and in-app purchases. Just as the district court stated: "[I]t takes time to find and reinstall apps or find substitute apps; to learn a new operating system; and to reconfigure app settings."[160] Additionally, besides the devices themselves, consumers also need to buy accessories, as they are not compatible.[161] These costs result in the persistent lock-in to iOS because there is no alternative for the majority of consumers, but to no one's surprise, the district court determined that the evidence was not enough to show "*substantial* switching costs . . . to create user lock-in" for the iPhone.[162]

It cannot be understood how the court concluded that Epic did not meet its burden. The factual findings show "that Apple sought to compete by distinguishing their product, and in the process, making its platforms 'stickier.'"[163] In doing so, it criticized Epic for not proving that the switching costs resulted from "nefarious" conduct by Apple.[164] However, the law does not require Epic Games to prove nefarious conduct.[165] The cost of smartphones continues to increase every year,[166] and this should not be strange

157. Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1049–50 (9th Cir. 2008).

158. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1024–26 (N.D. Cal. 2021).

159. *Id.* at 956.

160. *Id.* at 958.

161. *See id.*

162. *Id.*

163. *Id.* at 957.

164. *Id.*

165. *See The Antitrust Laws*, *supra* note 1 (noting that the Sherman Act only requires proof of unreasonable conduct).

166. Andy Walker, *Get Ready to Pay for More Expensive Smartphones Next Year*, ANDROID AUTH. (Sept. 7, 2021), https://www.androidauthority.com/more-expensive-smartphones-chipsets-2022-2747980/ [https://perma.cc/S7H6-MNQN].

to anyone as there is a massive shortage of chips.[167] Moreover, a Gallup poll from 2015 suggests that a customer who has invested in a new Apple device will likely not be able to switch devices in the short to medium term because the investment on the smartphone has already been made.[168] This shows that about 54% percent of U.S. smartphone users will not change their phone until it has stopped working or becomes "totally obsolete."[169] These results should be considered by the court when determining if there is a viable alternative to switching devices for consumers.

The court's assertions go against the factual findings, which clearly identified the barriers present to consumers when switching smartphones.[170] The court said that it "[was] left entirely in the dark about the *magnitude* of the switching costs and whether they present a meaningful barrier to switching *in practice*."[171] The plaintiffs in *Kodak* did not need to specify the amount of switching expenses; proof of the "heavy initial outlay," in addition to support and components, made clear that switching costs for current customers being extraordinarily high was enough.[172] In a similar manner, the Ninth Circuit hinted at "market imperfections" in *Newcal*, but did not demand that the plaintiff calculate switching costs.[173]

F. A Skeptical View on Future Legislation

The Open App Markets Act is a proposed antitrust bill currently in Congress.[174] Creators of the bill have defined its purpose as a bill "[t]o promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers."[175] The legislation aims to prevent companies like Apple and Google from engaging in anticompetitive practices in the different

167. Ryan Browne, *The Global Chip Shortage Is Starting to Hit the Smartphone Industry*, CNBC (July 29, 2021, 7:00 AM), https://www.cnbc.com/2021/07/29/the-global-chip-shortage-is-starting-to-hit-the-smartphone-industry.html [https://perma.cc/BUP4-XSJX].

168. Art Swift, *Americans Split on How Often They Upgrade Their Smartphones*, GALLUP (July 8, 2015), https://news.gallup.com/poll/184043/americans-split-often-upgrade-smartphones.aspx?utm_source=Economy&utm_medium=newsfeed&utm_campaign=tiles [https://perma.cc/83JS-YEEY].

169. *Id.*

170. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 956–58 (N.D. Cal. 2021).

171. *Id.* at 957.

172. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 477 (1992).

173. *See* Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1048–50 (9th Cir. 2008); *Eastman Kodak Co.*, 504 U.S. at 473–77.

174. Open App Markets Act, S. 2710, 117th Cong. (2021).

175. S. 2710.

app markets.[176] It is also intended to protect the ability to sideload apps and prevent operators of app marketplaces from preferencing their own product.[177] This proposed legislation would only apply to companies operating in the app marketplace that have more than 50 million users in the United States.[178] This Act would prohibit app store owners from requiring app developers to exclusively use the store owner's in-app payment system, eliminate the self-preferencing of apps where app store owners advantage their own apps and products over competitor developers, allow the download of third-party applications that are found outside of the different companies' app stores, and prevent sanctions imposed to app developers for offering apps or products outside the app store marketplace at lower prices.[179]

Ahead of the Senate Judiciary Committee vote, the Open App Markets Act received support from the heads of twenty tech companies.[180] Not surprisingly, Apple is opposed to the legislation, arguing that this could cause severe security issues, avoiding their control over the metadata and content that is downloaded and displayed in their devices.[181] The Open App Markets Act is definitely a step in the right direction from the legislative perspective. However, it is unclear when, if at all, this legislation will come into law.[182] This is why the court should take a proactive step towards resolving this issue with the tools currently at hand to avoid unfair market practices. It is clear that the holding of the district court would conflict with the Open App Markets Act, if ever passed.

176. *See* Lauren Feiner, *Senate Committee Advances Bill Targeting Google and Apple's App Store Profitability*, CNBC, https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html [https://perma.cc/JV9E-KMBG] (last updated Feb. 3, 2022, 12:27 PM).

177. S. 2710.

178. S. 2710 § 2(3).

179. S. 2710 §§ (3)–(5).

180. Rebecca Klar, *App Company CEOs Urge Senators to Back Antitrust Bill*, HILL (Jan. 28, 2022, 2:42 PM), https://thehill.com/policy/technology/591853-app-company-ceos-urge-senators-to-back-antitrust-bill/ [https://perma.cc/94L2-6KLP].

181. Chris Mills Rodrigo, *Tim Cook Cautions Against Antitrust Legislation*, HILL (Apr. 12, 2022, 10:34 AM), https://thehill.com/policy/technology/3265186-tim-cook-cautions-against-antitrust-legislation/ [https://perma.cc/8R3H-RM3C]; *Apple Urges Lawmakers Say No to App Store Bill*, REUTERS, https://www.reuters.com/legal/litigation/apple-urges-lawmakers-say-no-app-store-bill-2022-02-03/ [https://perma.cc/PXC4-DMLP] (last updated Feb. 2, 2022, 6:40 PM).

182. S. 2710 (no action has been taken on this bill since February 2022 when it was placed on the Legislative Calendar).

IV. CONCLUSION

The judgment of the district court and subsequently the Ninth Circuit should be reversed, as Apple is in clear violation of sections 1 and 2 of the Sherman Act. The decision by the court violates the clear imprint of statutory law and binding precedent.[183] The 30% cut Apple takes from its competitors for any sale made through the App Store, on top of all of the restrictions imposed in third-party app developers, clearly shows an intent to maintain and expand Apple's monopoly in the different markets it is involved in. A narrow view, one that ignores the existence of aftermarkets, is flawed. The decision in this case should work as precedent not only for the mobile gaming industry, but for any app developer that has something to offer to those consumers who use Apple's iPhone. The decision should have been overturned by the Supreme Court. However, in the process of waiting for certiorari, reflection must be done for Epic Games to have a chance of achieving justice. Nonetheless, the courts ignored the plain language of the Sherman Act and contradicted previously established case law. Although Epic Games presented a strong case against Apple, there also exists an opportunity to bolster its stance further in other cases like *Epic v. Google*, where it claimed a victory at the district court level. While several significant entities have experienced the repercussions of Apple's monopolistic practices, their efforts, primarily in the form of amicus briefs, may fall short of the required impact. If the aim is to drive substantial change, these entities could introduce their own claims rather than remain on the sidelines. This proactive involvement would not only diversify the scope of the litigation but also potentially fortify the legal standing in court. Notably, the involvement of companies such as Microsoft or Spotify is fundamental. Such participation not only signifies a unified front against monopolistic behaviors but also holds the potential to redefine the market dynamics. This inclusion would yield substantial evidence that courts cannot overlook, showcasing an undeniable market share that demands attention and corrective action.

Pierre Schlaefli

183. Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1048–1050 (9th Cir. 2008); *see* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 473–77 (1992).